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observation of his conduct, came to the conclusion he was laboring under "*suicidal mania*." The doctor however says, he seemed rational, and that this form of mania may exist without impairing the other mental faculties. Be that as it may, whatever doubt the testimony thus offered on the part of the caveators might excite if considered alone, yet when weighed with the proof on the part of the caveatees, we feel obliged to say, that it fails to establish such a want of testamentary capacity as would justify us in pronouncing against this will. Decree affirmed.

Supreme Court Commission of Ohio.

LEWIS HAYNER v. TRUMAN S. COWDEN.

Words charging a clergyman with drunkenness, when spoken of and concerning him in his office or calling, are actionable *per se*.

In an action where punitive damages may be allowed, evidence of the defendant's pecuniary ability is admissible.

It is not error to refuse to charge the jury, that if the defendant believed the charge to be true, though he had not reasonable cause for such belief, they could not award exemplary damages, where there is evidence tending to show that he uttered the words in a wanton and reckless manner.

ERROR to the District Court of Miami county. The facts appear in the opinion of the court.

James Murray, with whom were *J. T. Janvier* and *H. G. Sellers*, for plaintiff in error:—

1. A charge of drunkenness is not *per se* actionable: *Hollingsworth v. Shaw*, 19 Ohio St. 433; *Alfele v. Wright*, 17 Id. 239; *Dial v. Holter*, 6 Id. 235; *Buck v. Hersey*, 31 Maine 558; *O'Hanlon v. Myers*, 10 Rich. Law; Addison on Torts 4.

2. That the defendant is a minister of the gospel, does not change the rule. Ministers ought not to be regarded *in the eye of the law* as purer or holier than any other men, nor entitled to protection in any greater degree. The law is no longer a respecter of persons; it no longer makes any distinction between classes or conditions of men; its guiding star now is "equality before the law for all."

3. If the words spoken are actionable *per se*, it can only be in a case where they are spoken in reference to the performance of his ministerial duties: *Lumby v. Allday*, 1 Cr. & J. 301; 1 Tyrw. 217; *Brayne v. Cooper*, 5 M. & W. 249; *Ayre v. Craven*, 2 Adol. & El. 2.

In this case the word "preacher" was evidently used for the sole purpose of identifying the person to whom reference was made.

4. It must be averred that at the time the words were spoken plaintiff was a *paid* preacher, or in the receipt of *temporal* emoluments derived therefrom: *Gallwey v. Marshall*, 9 Exch. 295; *Starr v. Gardner*, 6 Upper Canada Q. B. O. S. 512; *Hartley v. Herring*, 8 Term 130.

5. The court erred in refusing to charge that if defendant had no reasonable cause to believe the words to be true when he uttered them, yet if the jury found *that he did in fact believe them to be true*, then the case was not one for exemplary, but for compensatory damages merely.

The distinction between malice in law and malice in fact is well settled. Malice in law is that malice which the law presumes to exist from the *mere* doing of an unlawful act; while malice in fact is that which exists when there is superadded to the other an *evil intention* in the party doing the act.

The only cases in which exemplary or punitive damages may be given are those in which actual or express malice is shown: *Roberts v. Mason*, 10 Ohio St. 283; *Pitt v. Donovan*, 1 M. & Sel. 639; *Armstrong v. Pierson*, 8 Clarke 29.

6. The court erred in admitting evidence as to the defendant's wealth, for the purpose of aggravating damages.

This whole theory of taking money from one man and giving it to another, under the plea that it is for purposes of punishment, however plausible it may appear at first blush, is wholly untenable in practice. It will not be claimed that a jury can or ought to go into an investigation as to all these extraneous matters; and yet, unless they do so, how are they to arrive at any proper measure of punishment? Money may be the god of this world, but it is most evidently very much more the god of one man than it is of another. The loss of it hurts one man vastly more than it does another. We say, then, that the mere taking from a defendant of a certain amount of money in proportion to his wealth can never be considered as a true rule or basis for the purposes of punishment, and that it is at variance with all settled principles of the law: *Ware v. Cartledge*, 24 Ala. 622; *Palmer v. Hoskins*, 28 Barb. 90; *Townshend on Slander*, sect. 391; 2 Greenl. Ev., sect. 249.

Conover & Craighead, with *Morris & Son*, for defendant in error:—

1. Words which would not otherwise be actionable *per se* may be so when spoken of a party in his profession or calling: *Watson v. Trask*, 6 Ohio 531; *Wilson v. Runyon*, Wright 651; 1 Am. Lead. Cas. 102; *Malone v. Stewart and Wife*, 15 Ohio 319; 6 Ohio St. 228; 17 Id. 238; *Buck v. Hersey*, 31 Maine 558.

That charges, such as are here alleged, made against a minister of the gospel falsely, are thus actionable, was long since determined by three courts of highest character, whose decisions have not, so far as we know, been overruled or questioned: *Chaddock v. Briggs*, 13 Mass. 251; *McMillan v. Birch*, 1 Binney 178; *Demarest v. Haring*, 6 Cowen 76; 1 Am. Lead. Cas., cited *supra*.

If the words spoken of the plaintiff below were true, their natural and obvious tendency was to unfit him for, disgrace him in, and deprive him of said ministerial office and the emoluments thereof. Words spoken falsely of any tradesman, officer, or professional man, which, if true, thus prejudice or injure him in reference to the pursuit in which he is engaged, are actionable without special injury being alleged.

2. Evidence as to the pecuniary circumstances of the defendant was properly admitted: *Roberts v. Mason*, 10 Ohio St. 277; *White v. Thomas*, 12 Id. 319; *McBride v. McLaughlin*, 5 Watts 375; *Waggoner v. Richmond*, Wright 173; *Sexton v. Todd*, Id. 320.

3. The court did not err in the charge given to the jury: *Hunt v. Bennett*, 19 N. Y. 173; *Fowler v. Bowen*, 30 Id. 20; 3 G. & W. on New Trials 726, 817; *Darby v. Ouseley*, 1 Hurl. & Nor. 1; *Nichols v. Packard*, 16 Verm. 83. Or in refusing to give the charge requested: 1 Townshend on Slander, sect. 361; *Thomas v. White*, 12 Ohio St. 316; *Ash v. Marlow*, 20 Ohio 119.

The jury is the tribunal to determine as to malice: *White v. Nichols*, 3 How. 266; *Nichols v. Packard*, 16 Vt. 83; *Adcock v. Marsh*, 8 Ired. 360; *Abrams v. Smith*, 3 Blackford 95.

The opinion of the court was delivered by

WRIGHT, J.—The slander alleged in the petition consists in falsely charging plaintiff, a minister of the gospel, with drunkenness. It is also averred that the words were spoken of and con-

cerning him in his ministerial profession and pastoral office. The demurrer admits all that is averred, and thus this question is raised: Are words which charge a minister of the gospel with drunkenness, when spoken of him in his profession or calling, actionable *per se*? We answer that they are. We understand the rule to be, that words spoken of a person, tending to injure him in his office, profession, or trade, are thus actionable: 1 Starkie on Slander 9; Townshend on Libel and Slander, sec. 182; 2 Addison on Torts 957 (sec. 2, chap. 17; ed. of 1876, of this book, has a large collection of authorities on the subject); 1 Am. Lead. Cas. 102; *Foulger v. Newcomb*, Law Rep. 2 Exch. 327; *Demarest v. Haring*, 6 Cow. 76.

Calling a clergyman a drunkard was held actionable in *McMillan v. Birch*, 1 Binney 176; *Chaddock v. Briggs*, 13 Mass. 251. Such words are actionable because they tend to deprive him of the emoluments which pertain to his profession, and may prevent his obtaining employment. It is not, as counsel seem to suppose, that giving a clergyman this right of action is because his office is higher than that of his fellow men. It is a right which belongs to all who have professions or callings, and in this clergymen are not different from others.

This principle is entirely different from that upon which proceeded the cases of *Hollingsworth v. Shaw*, 19 Ohio St. 430; *Dial v. Holter*, 6 Id. 228; *Alfele v. Wright*, 17 Id. 238. In all these, the words imputed a criminal offence, and did not relate to profession or calling.

Upon the trial of the case, it was insisted by defendant that the words were not spoken of the plaintiff in his character as a minister. The court fairly left this to the jury, and said if they were not so spoken, they should find for defendant. The jury find this issue for the plaintiff, and in the face of that finding it is impossible for us, sitting as a court of error, to say that they were not spoken of the plaintiff in his character or capacity as a clergyman. If they were, as we have seen, they are actionable.

In the cases cited by defendant, *Lumby v. Allday*, 1 Tyrw. 217; *Brayne v. Cooper*, 5 M. & W. 249; *Ayre v. Craven*, 2 A. & E. 2; *Buck v. Hersey*, 31 Me. 558; *Redway v. Gray*, 31 Vt. 292; *Van Tapel v. Capron*, 1 Denio 250; it was held that the words spoken did not touch the plaintiffs in their various trades or employments. But to charge a minister with drunkenness does have such an effect.

Congregations would not employ clergymen with intemperate habits, and the development of such a vice would be cause for speedy removal from office. When the question is reduced to a mere matter of dollars and cents, the purity, the integrity, the uprightness of a minister's life is his capital in this world's business.

Against the objection made, plaintiff offered evidence of the wealth of the defendant, and in the charge the court said this evidence might be considered in connection with the question of exemplary damages. We see no error in the admission of the evidence, or the charge of the court upon the subject. That punitive or exemplary damages in a proper case may be given, is not an open question in Ohio. In *Roberts v. Mason*, 10 Ohio St. 277; *Smith v. P., Ft. W. & C. Railroad*, 23 Id. 10, the court allowed the jury to consider the wealth of defendant in connection with the question of punitive damages. If, then, punishment be an object of a verdict, a small sum would not be felt by a defendant of large wealth. The vengeance of the law would scarcely be appreciated, and he could afford to pay and slander still. There are cases which put the admission of the evidence upon this ground. *Alpin v. Morten*, 21 Ohio St. 536, intimates that the reason is to enable the jury to determine how much plaintiff has been injured. This case collects the authorities on both sides of the question, to which might be added *McBride v. McLaughlin*, 5 Watts 375; *Waggoner v. Richmond*, Wright 173; *Sexton v. Todd*, Id. 320; 2 Greenl. Ev. 249; 1 Am. Lead. Cas. 199, note 6; *Horsley v. Brooks*, 20 Ia. 115; *Buckley v. Knapp*, 48 Mo. 153. We see no error in the admission of the evidence, or the charge of the court on the subject.

There are some other questions raised by counsel, to which we briefly allude:—

The defendant asked the court to charge the jury: "If they find that the words spoken by the defendants of and concerning the plaintiff were untrue, and that the defendant has not reasonable cause to believe them to be true; yet, if they are satisfied from the evidence that the defendant did believe them to be true, such state of facts would not warrant a verdict for punitive or exemplary damages, but for compensatory damages only." With which request the court refused to comply, but, on the contrary, charged the jury that such was not the law, to which the defendant then and there excepted.

We do not understand the law of slander to be, that it is a defence that the slanderer believed his words to be true, when he had no grounds for so believing. Belief must have a foundation in something. Take away foundation, and what can be left? The charge asked seems to us a solecism. Belief can only be claimed as a defence, or in mitigation, where it is based upon such facts or reasons as would incline a reasonable person so to believe. Inasmuch as this charge was asked in reference to exemplary damages, and there was evidence tending to show that the words had been spoken under circumstances indicating wantonness and recklessness, the charge was properly refused.

It appears to be seriously argued that, in a minister of the gospel, a single act of intoxication is not a fault, and therefore a charge of that kind cannot be injurious. We can hardly assent to this proposition. In a religious teacher, one offence of the kind must be considered a grave departure from propriety and duty; and to say that the act has been committed is calculated to impair usefulness.

As to the question of excessive damages, the verdict was large; still we do not think defendant can complain, in view of all the circumstances of the case. Judgment affirmed.

DAY, J., dissented as to the admissibility of evidence of defendant's pecuniary ability.

Supreme Court of Illinois.

WILLIAM ROTH v. MARY EPPY.

Under the statute of Illinois giving a right of action against a person selling liquor to a habitual drunkard it is sufficient to aver and prove that habitual intoxication was caused *in part* by such sale. It is a tort and plaintiff may recover as in other torts if there is enough evidence to support any part of his charge.

In an action by a wife for selling liquor to her husband, evidence that his intoxication led to loss of his situation and inability to get other employment is admissible.

Exemplary damages can only be recovered where there is damage in fact. Exemplary and punitive damages are synonymous terms.

The right of action is given by the statute to the person injured without reference to the defendant's knowledge of the consequences of his act.

THIS was an action on the case, brought by Mary Eppy, under the Liquor Act, against William Roth,* to recover for injury in her means of support, in consequence of the habitual intoxication of